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State v. Bolden: Louisiana's Anomalous Reliance on the Anonymous Informant

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NOTES

State v. Bolden: LOUISIANA'S ANOMALOUS RELIANCE ON THE ANONYMOUS INFORMANT

A police officer was told by an unidentified informant that he recently had seen,[1] in a nearby nightclub, a man with a sawed-off shotgun in his pants. The informant and the officer, travelling together to the location, found the club closed. They met two other officers at the club, one of whom obtained a more detailed description of the suspect from the informant. Unaccompanied by the informant, this officer then proceeded to a nearby café he knew from experience to be frequented by customers of the nightclub after closing hours. None of the officers ever determined the identity of the informant. After waiting about five minutes, the officer observed a man fitting the informant's description, later identified as the appellant, get out of a car parked near the cafe. The officer called for the individual to stop, made a limited patdown of his outer garments, and discovered a sawed-off shotgun in the exact location described by the informant. The trial court denied the appellant's motion to suppress the firearm and convicted him on two counts of illegal weapons violations.[2] The Louisiana Supreme Court affirmed the conviction and *held* that an in person, anonymous[3] tip to a police officer, containing a detailed, eyewitness description of a suspect in possession of an extremely dangerous weapon, may provide an officer reasonable cause to stop an individual meeting this description and, for the officer's protection, to conduct a limited patdown of the person's outer garments in search of the weapon. *State v. Bolden*, 380 So. 2d 40 (La. 1980).

The fourth amendment expressly protects citizens of the United States from "unreasonable searches and seizures."[4] This protection

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1. Although the facts related in the court's summary do not reveal explicitly that the informant told the officer the informant had seen the man with the gun, both the majority's discussion and the petitioner's brief so indicate. State v. Bolden, 380 So. 2d 40, 42 (La. 1980). *See also* Petitioner's Brief for Certiorari at 3.

2. The appellant pleaded guilty to the possession of a firearm by a convicted felon in violation of LA. R.S. 14:95.1 (Supp. 1975) and to the possession of an illegal firearm in violation of LA. R.S. 40:1785 (1950).

3. Since the officers never determined the informant's identity, the majority conceded that he was of no greater reliability than an anonymous informant. 380 So. 2d at 42.

4. U.S. CONST. amend. IV provides:

> The right of the people to be secure in their persons, houses, papers, and ef-

also safeguards citizens from the same actions by their state governments.[5] Even such encounters as the investigatory stop and frisk, while less intrusive than a technical arrest or a "full-blown" search, trigger the amendment's provisions.[6] *Sibron v. New York*[7] states that "[b]efore an officer places a hand on the person of a citizen in search of anything, he must have constitutionally adequate grounds for doing so."[8] In determining the reasonableness of the policeman's actions, courts have weighed the "need to search against the invasion which the search entails."[9] The United States Supreme Court has held on several occasions that unless the investigating officer can articulate specific facts from which he inferred that the persons whom he stopped were armed and dangerous, a protective search for weapons is unreasonable.[10]

Since its approval of the investigatory stop and frisk, the United States Supreme Court has upheld only one such encounter based on observations made by someone other than the investigating officer. In that case, *Adams v. Williams*,[11] the majority approved a stop made upon information supplied to a policeman by a *known* informant who previously had given the officer information.[12] Conceding that the tip did not furnish probable cause to arrest under the *Aguilar-Spinelli* test,[13] the Court concluded that the information car-

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fects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.

5. Mapp v. Ohio, 367 U.S. 643 (1961). *See also* Elkins v. United States, 364 U.S. 206 (1960).

6. Terry v. Ohio, 392 U.S. 1, 16 (1968). For the purposes of this note, the terms "investigatory stop" and "stop" refer to situations when an officer, by means of physical force or a show of authority, in some way restrains the liberty of a citizen. *Id.* at 19 n.16. For a more recent discussion of seizure of a person, *see* United States v. Mendenhall, 100 S. Ct. 1870 (1980).

7. 392 U.S. 40 (1968).

8. *Id.* at 64.

9. Terry v. Ohio, 392 U.S. 1, 21 (1968). *See* Camara v. Municipal Court, 387 U.S. 523, 534-35, 536-37 (1967).

10. Adams v. Williams, 407 U.S. 143, 146 (1972); Terry v. Ohio, 392 U.S. 1, 30 (1968).

11. 407 U.S. 143 (1972).

12. *Id.* at 146.

13. Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964). The *Aguilar-Spinelli* test consists of two prongs which must be met to establish probable cause: (1) The officer must show that the informant has been reliable in the past; and (2) the officer must demonstrate that the informant obtained his information from a reliable source. Although Justice Rehnquist does not state expressly why the information does not meet the test in *Adams*, a close analysis indicates that the informant was of dubious past reliability and that the informant did not indicate the source of his information to the police officer.

ried indicia of reliability sufficient to justify a forcible stop of the suspect.[14] However, the opinion declares that some information received by an officer either would warrant no police response or would require further investigation to justify a forcible stop of the suspect.[15]

No Supreme Court decision deals with the issue of the instant case, *i.e.*, whether a police officer may stop an individual who simply matches an *anonymous* informant's description of a suspect allegedly armed with a dangerous weapon, although the officer does not observe the individual's engaging in any suspicious behavior. However, several state[16] and federal[17] appellate courts have confronted directly this question and reached conflicting conclusions. In *United States v. McLeroy*,[18] the United States Fifth Circuit Court of Appeals invalidated a stop for the investigation of possession of a sawed-off shotgun made upon an officer's corroboration only of a description available to the general public. The court stated, "[r]easonable suspicion requires more than this minimal corroboration of innocent details."[19] However, in the most recent state case, *People v. Tooks*,[20] a sharply divided Michigan Supreme Court upheld a stop based on facts strikingly similar to those in *Bolden*.

Stop and frisk analyses in courts other than Louisiana's to date have applied only the fourth amendment's prohibition against unrea-

14. 407 U.S. at 147-48.

15. *Id.* at 147. Justice Rehnquist intimated that an anonymous telephone call would fall into this category. *Id.*

16. Only four state courts actually have considered whether a person may be stopped when he simply matches an anonymous informant's description and an exigency does not exist. Three states have allowed investigatory stops on such information. People v. Tooks, 403 Mich. 568, 271 N.W.2d 503 (1978); State *ex. rel.* H.B., 75 N.J. 243, 381 A.2d 759 (1977); People v. Kinlock, 43 N.Y.2d 832, 373 N.E.2d 372 (1977). One state has rejected expressly the notion that an anonymous informant may justify an investigatory stop. Commonwealth v. Anderson, 342 A.2d 1298 (Pa. 1978). The appeals court for the District of Columbia has allowed a stop based on information supplied in person by an individual who refused to identify himself. United States v. Walker, 294 A.2d 376 (D.C. 1972).

17. The fourth and fifth circuits have reached opposite conclusions. *Compare* United States v. McLeroy, 584 F.2d 746 (5th Cir. 1978) (the stop is unjustified) *with* United States v. Gorin, 564 F.2d 159 (4th Cir. 1977) (the stop is valid). In *State v. Jernigan*, 377 So. 2d 1222, 1225 (La. 1979), the Louisiana Supreme Court cited three cases that are easily distinguished from both *Jernigan* and the instant case, *Bolden*. United States v. Hernandez, 486 F.2d 614 (7th Cir. 1973) (source was determined); United States v. Legato, 480 F.2d 408 (5th Cir. 1973) (suspect behaved suspiciously before the stop); United States v. Unverzagt, 424 F.2d 396 (8th Cir. 1970) (anonymous informant and another informant whose identity was determined).

18. 584 F.2d 746 (5th Cir. 1978).

19. *Id.* at 748.

20. 403 Mich. 568, 271 N.W.2d 503 (1978).

sonable searches and seizures. However, the Louisiana Constitution provides an additional guarantee, the protection against unreasonable "invasions of privacy."[21] On several occasions the Louisiana Supreme Court has held that the state constitutional prohibition imposes a standard, higher than that of the Federal Constitution, which must be met before a Louisiana police officer may detain an individual.[22] In *State v. Kinneman*,[23] the court concluded that this higher standard required that "probable cause" be established before an investigatory stop is made:

> Should there be any doubt that the right of the police to forcefully stop and search others is circumscribed by the Fourth Amendment of the United States Constitution, there can be none that the Louisiana Constitution of 1974, by the inclusion of the words "invasions of privacy" meant to extend the "probable cause" requirement to protect that right as well as the right to be secure against unreasonable searches and seizures.[24]

In a later decision, *State v. Wilson*,[25] Justice Tate declared that the protections afforded by the Louisiana Constitution require that before a stop be made on a known informant's tip, the informant and his information must withstand the rigors of the *Aguilar-Spinelli* test for reliability,[26] a higher requirement than that set by the United States Supreme Court.[27]

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21. LA. CONST. art. I, § 5 provides:

> Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy. No warrant shall issue without probable cause supported by oath or affirmation, and particularly describing the place to be searched, the persons or things to be seized, and the lawful purpose or reason for the search. Any person adversely affected by a search or seizure conducted in violation of this section shall have standing to raise its illegality in the appropriate court.

22. *Compare* State v. Washington, 364 So. 2d 958 (La. 1978) (suspect's fitting the "Detroit profile" held not to justify police action) *with* United States v. Mendenhall, 100 S. Ct. 1870 (1980) (fitting the "Detroit profile" may justify some police action). The "Detroit profile" consists of a list of characteristics, including arrival from a source city, travelling alone, sitting in the back of the plane, and carrying no luggage, which are thought to be attributes of illegal drug couriers.

23. 337 So. 2d 441 (La. 1976).

24. *Id.* at 443-44.

25. 366 So. 2d 1328 (La. 1978). "An unverified and undifferentiated tip derived from an undisclosed source cannot supply the reasonable cause to justify an intrusion upon a person's liberty, whether that intrusion is characterized as an arrest or as an investigatory stop." *Id.* at 1333.

26. "[T]he same criteria of trustworthiness required for the showing of the greater degree of probability of criminal conduct [is] necessary to justify an arrest." *Id.* at 1332.

27. In *Adams v. Williams*, 407 U.S. 143, 147 (1972), Justice Rehnquist stated that the information received by the officer, while probably insufficient under the *Aguilar-*

Subsequently, in *State v. Brown*[28] the Louisiana Supreme Court allowed a stop based upon a detailed description provided by an unknown informant. Justice Tate, again writing for the majority, relied on language in *Spinelli v. United States*[29] and concluded that because the officer observed the suspect engaged in behavior suggestive of the crime alleged[30] and because the detailed information fit only one person in the location named by the informant, the detention was justified.[31]

Less than one month before announcing the *Bolden* decision, in *State v. Jernigan*[32] the Louisiana Supreme Court went beyond the position that an anonymous informant can furnish reasonable cause only after a police officer observes the suspect engaging in suspicious behavior. In *Jernigan* an anonymous caller alleged that a particularly dressed individual was carrying a firearm in a specified bar. The investigating officer immediately went to the bar and observed only one person matching the description. The officer frisked this individual and discovered a handgun. The state supreme court emphasized that a gun in an occupied alcoholic beverage outlet presents an immediate danger to the public and held that the policeman's actions were reasonable.[33] Although the United States Supreme Court denied the writ of certiorari,[34] Justice White, joined by two other Justices in an unusual dissent from the denial,[35] declared that *Jernigan* was "arguably . . . inconsistent"[36] with prior opinions of the Court.

In the instant case, *State v. Bolden*, the Louisiana Supreme Court, broadening the holdings of *Brown* and *Jernigan*, allowed

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Spinelli test, still carried enough indicia of reliability to justify an investigatory stop.

The higher standard of the Louisiana Declaration of Rights is not limited just to the investigatory stop and frisk aspect of criminal justice administration. *Compare* LA. CONST. art. I, § 5 *with* Rakas v. Illinois, 438 U.S. 128 (1978). *Compare* LA. CONST. art. I, § 13 *with* Miranda v. Arizona, 384 U.S. 436 (1966). *Compare* LA. CONST. art. I, § 20 *with* U.S. CONST. amend. VIII. *See* Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 LA. L. REV. 1 (1974).

28. 370 So. 2d 547 (La. 1979).

29. 393 U.S. 410 (1969).

30. In *Brown*, the suspect's behavior conformed to the "Detroit profile." See note 22, *supra*. *But see* State v. Matthews, 366 So. 2d 1348 (La. 1978) (a vague description will not justify an airport search even though the suspect's behavior fits the "Detroit profile"); State v. Washington, 364 So. 2d 958 (La. 1978) (simply matching the "Detroit profile" is not enough to justify a stop in Louisiana).

31. 370 So. 2d 547, 551 (La. 1979).

32. 377 So. 2d 1222 (La. 1979).

33. *Id.* at 1225.

34. Jernigan v. Louisiana, 100 S. Ct. at 2930 (1980) (White, J., dissenting).

35. *Id.*

36. *Id.* at 2931.

police officers to stop an individual on a public sidewalk, although he had made no furtive gestures before the encounter but simply matched an anonymous informant's description. Without discussing the right to privacy vouchsafed by the Louisiana Constitution, the court applied federal and state constitutional prohibitions against unreasonable searches as the sole standards for evaluating the police officer's actions.[37] Jurisprudence clearly indicates that the legitimacy of any stop and frisk is determined by constitutional limitations.[38] However, the United States Supreme Court's application of the fourth amendment[39] is supplemented in Louisiana by the right to privacy clause of article I, § 5 of the Louisiana Constitution.[40] And a careful consideration of both provisions, as well as of the spirits underlying them, should have led the *Bolden* court to invalidate the stop.

The judiciary is exposed to an investigatory stop and frisk only after the search has occurred.[41] For this reason, to maintain a check on the police officer's actions, the United States Supreme Court has determined that a stop is justified (and, therefore, may yield admissible evidence) only if judicial review indicates that a reasonable man would have concluded that the person with whom the officer dealt was armed and dangerous.[42] The Court has approved stops only when the officer acted upon either his own observations[43] or upon the observations of a person known to the officer.[44] In these situations, a court possesses the ability to examine closely the facts available to the officer in order to determine the reasonableness of his actions. However, police response to an *anonymous* informant's tip, as in *Bolden*, thwarts judicial scrutiny. A court evaluating such action is forced to rely solely upon the officer's testimony as to the nature and content of the tip.[45] Sanctioning action based upon an

37. 380 So. 2d at 41-42; *But see* LA. CONST. art. I, § 5 (the right to be free from unreasonable invasions of privacy). See note 21, *supra*, for the constitutional text.

38. *See* Delaware v. Prouse, 440 U.S. 648 (1979); Terry v. Ohio, 392 U.S. 1 (1968); State v. Wilson, 366 So. 2d 1328 (La. 1978).

39. See note 4, *supra*.

40. See note 21, *supra*.

41. Terry v. Ohio, 392 U.S. 1, 12-16 (1968).

42. *Id.* at 21-22.

43. Terry v. Ohio, 392 U.S. 1 (1968).

44. Adams v. Williams, 407 U.S. 143 (1972).

45. For a discussion of the effect on the burden of proof when a trial court relies solely upon an officer's testimony, *see* Comment, *In Re H.B.: An Unfortunate Expansion of the Power to Stop and Frisk*, 32 RUT. L. REV. 118, 138 (1979).

Reliance on an untested source presents myriad problems. *Bolden* raises the possibility that a police officer might, acting upon information supplied by a lying or vindictive informant, frisk innocent citizens. In the volatile areas where investigatory stops generally take place, such "harassment" could prove particularly unfortunate.

anonymous informant's tip upsets the delicate balance between protecting the policeman and prohibiting unwarranted stops. For example, under the facts of *Bolden*, an officer might frisk a citizen and, if a weapon were found, "manufacture" an anonymous tipster.

As Justice Dennis's dissent pointedly notes, *Bolden* not only conflicts with the spirit of *Adams v. Williams*,[46] but also is flatly inconsistent with the law as described by Justice Rehnquist in *Adams*, in which "[t]he central reason" that the frisk was justified was "'that the informant was known to the officer personally and had provided him with information in the past.'"[47] *Adams* expressly approves an investigatory stop on an unverified tip in only two situations—when a victim reports a street crime and when a credible informant warns of a specific impending crime.[48]

In addition, the *Bolden* majority failed to consider previous opinions of the Louisiana Supreme Court that discussed the state constitutional right to privacy and the protections it affords. While earlier opinions indicate that the privacy clause severely restricts the situations in which Louisiana's police officers may make an investigatory stop,[49] *Bolden* approved a stop based upon information supplied by an untested, unknown source who could not testify at trial. The court offers no explanation for the failure of the officers to determine the informant's identity, an omission particularly problematic since both federal and state court opinions decry reliance on an unidentified source.[50]

The reasoning in *Bolden* suggests that three important considerations determined the result. First, the court noted that the informant made his tip in person.[51] Certainly other courts faced with similar facts have given greater weight to in person anonymous tips than to anonymous telephone calls.[52] Since the *Bolden* patdown occurred in non-exigent circumstances, a requirement that the information be derived from the more reliable of the two types of anonymous tips is not unreasonable.

For a discussion of the lying informant, *see* Comment, *The Undisclosed Informant and the Fourth Amendment: A Search for Meaningful Standards*, 81 YALE L.J. 703, 718 (1972).

46. 407 U.S. 143 (1972).

47. 380 So. 2d at 43 (Dennis, J., dissenting), *quoting* Adams v. Williams, 407 U.S. 143, 146 (1972).

48. 407 U.S. at 147.

49. *See, e.g.*, State v. Kinneman, 337 So. 2d 441 (La. 1976). See text at note 26, *supra*. *See generally* State v. Wilson, 366 So. 2d 1328 (La. 1978).

50. *See, e.g.*, Spinelli v. United States, 393 U.S. 410 (1969); State v. Wilson, 366 So. 2d 1328 (La. 1978).

51. 380 So. 2d at 41.

52. *See, e.g.*, United States v. Walker, 294 A.2d 376 (D.C. 1972).

Second, the *Bolden* majority was persuaded by the detail of the informant's eyewitness report.[53] A tip from an eyewitness satisfies the reliability-of-information prong of the *Aguilar-Spinelli* test[54] and should reduce the likelihood of unwarranted intrusions upon the persons of innocent citizens.

Third, the majority obviously was persuaded by the involvement of an extremely dangerous weapon, presenting a high risk to the officer or the public.[55] The court emphasized that possession of a sawed-off shotgun creates an "acute public interest in swift police action."[56] Since, as Justice Rehnquist wrote in *Adams v. Williams*, "[t]he purpose for this limited search [an investigatory stop and frisk] is not to discover evidence of crime,"[57] low-risk offenses, such as the possession of narcotics or even of some weapons, would not come within the *Bolden* rationale. Because a frisk on a city sidewalk is a significant intrusion upon individual liberty, the existence of a "need for immediate action"[58] has been required to justify the search.

The constitutions of the United States and of Louisiana charge the judiciary with the duty of maintaining the tenuous balance between protecting police officers and safeguarding individual rights. Unfortunately, *Bolden* may protect police safety at the expense of individual liberty. Frisks based upon information supplied by a vindictive informant, a lying informant, or even a "manufactured" informant are foreseeable under the reasoning of the instant case. The potential for such unwarranted government activity suggests that *State v. Bolden* should remain limited; extension of its rationale or further elevation of the anonymous informant's role could impair severely "the right to be let alone,"[59] a right the Louisiana Supreme Court has considered an interest of utmost importance to a free society.[60]

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53. 380 So. 2d at 42.

54. Prong two, the ultimate source of the informant's tip, is met when an eyewitness reports a crime.

55. 380 So. 2d at 42.

56. *Id.*

57. 407 U.S. 143, 146 (1972).

58. Sibron v. New York, 392 U.S. at 73 (1968) (Harlan, J., concurring).

59. Olmstead v. United States, 277 U.S. at 478 (1928) (Brandeis, J., dissenting).

60. State v. Saia, 302 So. 2d 869 (La. 1974).